Supreme Court, U.S.
FILED
MAR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO.-CONN. and-
GRACE PETROLEUM CORPORATION,

Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONERS

W. Donald McSweeney
Allan Horwich
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Denis McInerney*
Charles A. Gilman
CAHILL GORDON & REINDEL
Eighty Pine Street
New York, New York 10005
(212) 701-3000

*Counsel of Record for
Petitioners

TABLE OF CONTENTS

PAGE

I. The Issues Presented Are Ripe For Adjudication 1

II. The Decision Below Clearly Conflicts with this Court's *Gasoline Products* Rule and the Rule of Other Circuits 3

III. The Response Does Not Address The Serious Constitutional Issues Raised by the Petition .. 5

IV. In the Exercise of Its Supervisory Authority, and to Prevent the Waste of Judicial Resources, This Court Should Consider and Clarify the Proper Procedure After a Trial in Which the Plaintiff Fails to Prove Damages.. 7

Conclusion..... 8

TABLE OF AUTHORITIES

Cases	PAGE
Abbott Laboratories v. *Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976)	3n
In re Air Crash Disaster Near Chicago, Illinois, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981)	6n
Aldrich v. *Thomson McKinnon Securities, Inc.*, 756 F.2d 243 (2d Cir. 1985)	4n
Avern Trust v. *Clarke*, 415 F.2d 1238 (7th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970)	5n
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	5
Bankers Life & Casualty Co. v. *Kirtley*, 307 F.2d 418 (8th Cir. 1962)	4n
Blake v. *Robertson*, 94 U.S. 728 (1876)	7n
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	2n
Brown v. *New York Life Insurance Co.*, 152 F.2d 246 (9th Cir. 1945)	6n-7n
Browning-Ferris Industries, Inc. v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), 152 F.2d 246 (9th Cir.)	5
Carey v. *Piphus*, 435 U.S. 247 (1978)	2n-3n
Christison v. *Jones*, 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980)	6
Creighton v. *County of Pope*, 386 Ill. 468, 54 N.E.2d 543 (1944)	6
EPA v. *National Crushed Stone Ass'n*, 449 U.S. 64 (1980)	2

PAGE

Espaillat v. *Berlitz Schools of Languages of America, Inc.*, 383 F.2d 220 (D.C. Cir. 1967)..... 4

FDIC v. *Abraham*, 439 F. Supp. 1150 (E.D. La. 1977) 7n

FDIC v. *Braemoor Associates*, 686 F.2d 550 (7th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983)..... 6

FDIC v. *Hudson*, 643 F. Supp. 496 (D. Kan. 1986).. 6n

FDIC v. *Main Hurdman*, 655 F. Supp. 259 (E.D. Cal. 1987)..... 6n

Forsyth v. Hammond, 166 U.S. 506 (1897)..... 2n

Froud v. *Celtex Corp.*, 98 Ill. 2d 324, 456 N.E. 2d 131 (1983)..... 6n

Fury Imports, Inc. v. *Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977)..... 4n

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494 (1931)..... 1-5

K-B Trucking Co. v. *Riss International Corp.*, 763 F.2d 1148 (10th Cir. 1985)..... 4

Malandris v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir.), *cert. denied*, 464 U.S. 824 (1983)..... 4n

Manufacturing Research Corp. v. *Greenlee Tool Co.*, 693 F.2d 1037 (11th Cir. 1982)..... 4n

Mattyasovszky v. *West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975)..... 6n

Maxey v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984)..... 4n

McDonald v. *Johnson & Johnson*, 722 F.2d 1370 (8th Cir.), *cert. denied*, 469 U.S. 870 (1984)..... 4n

PAGE

MCI Communication Corp. v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) 4n

Nodak Oil Co. v. *Mobil Oil Corp.*, 533 F.2d 401 (8th Cir. 1976) 4n

North Chicago Street Ry. v. *Ackley*, 171 Ill. 100, 49 N.E. 222 (1897) 6

Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974) 3n

Slater v. *KFC Corp.*, 621 F.2d 932 (8th Cir. 1980) ... 4n

Smyth Sales, Inc. v. *Petroleum Heat & Power Co.*, 141 F.2d 41 (3d Cir. 1944) 4n

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) 2

Time, Inc. v. *Pape*, 401 U.S. 279 (1971) 3n

United States v. *Gulf Refining Co.*, 268 U.S. 542 (1925) 2

Ustrak v. *Fairman*, 781 F.2d 573 (7th Cir.), *cert. denied*, 479 U.S. 824 (1986) 7n

Watts v. *Laurent*, 774 F.2d 168 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986) 4n, 5

Western Fireproofing Co. v. *W.R. Grace & Co.*, No. 88-2396, 1990 WESTLAW 10839 (8th Cir. Feb. 7, 1990) 4n-5n

PAGE

Constitutional Provisions

United States Constitution

Amend. V. 7
Amend. VII ..... *passim*
Amend. VIII 5-7
Amend. XIV 7

Statute

Civil Rights Law, 42 U.S.C. § 1983 (1982) 5

Other Authorities

3 Ill. Law & Prac. *Assignments* (1953) 6

2 L. Schlueter & K. Redden, *Punitive Damages* (2d ed. 1989) 5n

17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1988) 2

U.S. Sup. Ct. Rule 29.1 ..... 1n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-902

W.R. GRACE & CO.-CONN. and
GRACE PETROLEUM CORPORATION,
Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONERS

I. The Issues Presented Are Ripe For Adjudication.

The Solicitor General argues that the issues presented by the Petition are not ripe for review because the court of appeals remanded the case for a new trial on damages, thus placing it in an "interlocutory posture" (Brief for the Respondent in Opposition (hereinafter "Response" or "SG Br.") at 4-5). This argument ignores the waste of judicial resources and prejudice to the parties if petitioners are correct, as well as the fact that this case comes to the Court in precisely the same procedural posture as *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). As in that case, petitioners (here collectively called "Grace")[1] face the immediate prospect of a retrial that violates the Seventh Amendment. It is nothing short of specious to suggest that

1 Pursuant to Supreme Court Rule 29.1, the Court is respectfully referred to Note 1 in Grace's Petition for a Writ of Certiorari for a list of parent and subsidiary companies.

the issues here raised, two of which this Court has previously considered substantial (Petition at 8-10) or controlling (Petition at 13), should be considered only *after* the retrial ordered by the court of appeals. *United States* v. *Gulf Refining Co.*, 268 U.S. 542 (1925), where the Solicitor General made the same argument, held that "the petition may be granted, notwithstanding the Circuit Court of Appeals remanded the case for a new trial and did not render a final judgment therein." *Id.* at 545.

There is nothing hypothetical about the impending injury to Grace in the remand as framed by the court below. Each of the three questions presented by Grace's Petition is " 'fit' for judicial review because it involves only a question of law" worthy of this Court's attention. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980); *see also Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985).[2] *Certiorari* has frequently been granted to review a remand for further proceedings, including trials and retrials.

> "In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036, at 29-30 (2d ed. 1988). *See id.* at 30-31 n.57 and the cases cited therein.[3]

---

2 The Response seems to suggest, by quoting an isolated sentence from *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (*per curiam*), that a decision of a court of appeals remanding a case for retrial is *per se* unreviewable (SG Br. at 4). This Court has long held otherwise.

> "The power [to issue a writ of *certiorari*] is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein." *Forsyth* v. *Hammond*, 166 U.S. 506, 513 (1897).

3 *See, e.g., Carey* v. *Piphus*, 435 U.S. 247, 252-53 (1978) (*certiorari* granted on issue of proof of damages required after court of appeals

In short, the Response's ripeness and finality arguments are insufficient to sidestep the important issues presented by Grace's Petition.

II. The Decision Below Clearly Conflicts with this Court's *Gasoline Products* Rule and the Rule of Other Circuits.

The FDIC's Response attempts to dismiss Grace's Seventh Amendment objection to a retrial limited to compensatory and punitive damages as a "factbound quarrel" (SG Br. at 9) supported by "factbound" decisions (*id.* at n.5). This claim is particularly disingenuous when it misstates the "central issue on liability . . . [and] on compensatory damages" and ignores the court below's direction for a retrial on *punitive* damages (SG Br. at 11). To restate briefly, the central issues on liability are whether Grace had a duty to disclose the dry well after receiving the bank's unconditional loan commitment, whether it was aware of that duty but intentionally violated it, and whether the bank was deceived to its detriment by that failure to disclose. All of these questions, as well as other evidence concerning the knowledge and state of mind of both sides, will have to be determined by the jury on any retrial of punitive damages.

As the Petition noted (at 14-15), eight other courts of appeals have consistently held that when issues of liability and damages are inherently intertwined—as they are when a retrial is ordered on the issue of punitive damages for fraud—there must be a complete new trial in order to preserve defendants' right to a fair trial. These cases are far from "fact-bound".[4] Moreover, in this case compensatory

---

remanded for further proceedings on that issue); *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976), *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 574-75 (1974), and *Time, Inc.* v. *Pape*, 401 U.S. 279, 283 (1971) (*certiorari* granted after court of appeals reversed district court's dismissal or grant of directed verdict).

4 In each of the following fraud cases, under a great variety of factual circumstances, the court of appeals held that the assessment of punitive damages by a second jury required a complete new trial under the Seventh Amendment and the rule of *Gasoline Products*. *Western Fire-*

damage issues also require the retrial of liability issues (Petition at 13-14) because of an "overlap" that the Solicitor General apparently concedes in his brief (SG Br. at 11).

The Response accuses Grace of "ignor[ing] the numerous cases" purportedly holding that "damages in fraud and other actions may be determined independently after a finding of liability" (SG Br. at 10). Four of the six cases cited without analysis are *not* fraud cases, and three of these did not concern punitive damages.[5] Of the two remaining cases, one did not involve punitive damages and the compensatory damage issue did not overlap proof of liability, *Espaillat* v. *Berlitz Schools of Languages of America, Inc.*, 383 F.2d 220, 224 (D.C. Cir. 1967); the last case cited followed a special verdict rendered by the first jury, *K-B Trucking Co.* v. *Riss International Corp.*, 763 F.2d 1148, 1153 (10th Cir. 1985), which—as we advised the Court in our Petition (at 15 n.14)—gives rise to a long-recognized exception to the rule of *Gasoline Products* wholly inapplicable to the general verdict rendered by the first jury in this action.

---

proofing Co. v. *W.R. Grace & Co.*, No. 88-2396, 1990 WESTLAW 10839 (8th Cir. February 7, 1990); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1388 (8th Cir.), *cert. denied*, 469 U.S. 870 (1984); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980); *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376, 1389 (5th Cir. 1977); *Nodak Oil Co.* v. *Mobil Oil Corp.*, 533 F.2d 401, 411 (8th Cir. 1976); *Bankers Life & Casualty Co.* v. *Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962); *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944). *See also Aldrich* v. *Thomson McKinnon Securities, Inc.*, 756 F.2d 243, 249 (2d Cir. 1985); *Malandris* v. *Merrill Lynch Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1178 (10th Cir. 1981) (*en banc*), *cert. denied*, 464 U.S. 824 (1983).

5 *Watts* v. *Laurent*, 774 F.2d 168 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1985) (§ 1983 action); *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (antitrust action); *Manufacturing Research Corp.* v. *Greenlee Tool Co.*, 693 F.2d 1037 (11th Cir. 1982) (antitrust and tortious interference action); *Maxey* v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984) (*per curiam*) (products liability action).

As a final parry, the respondent urges that petitioners need not be concerned about a fair retrial in view of the "particular sensitivity" evidenced by the Seventh Circuit in the *Watts* case, a 42 U.S.C. § 1983 (1982) action cited in our last footnote (SG Br. at 11-12). To the extent that the *Watts* decision sanctioned the second jury retrying liability issues in assessing damages, it too is at odds with this Court's *Gasoline Products* decision.

III. The Response Does Not Address The Serious Constitutional Issues Raised By The Petition.

The FDIC does not dispute our assertion that it has no Congressional authorization to recover punitive damages, and neither side to this action has found a single case in which the FDIC has recovered punitive damages. Its Response virtually ignores the serious constitutional issues raised by the Petition and previously recognized by this Court in *Browning-Ferris Industries, Inc.* v. *Kelco Disposel, Inc.*, 109 S. Ct. 2909 (1989) and *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988). Instead, it attempts to finesse them by arguing that they are premature until after another trial and that the Eighth Amendment doesn't apply because the FDIC seeks punitives not as a government agency but as Continental Bank's assignee.

When the complaint was filed by Continental Bank, it alleged a federal securities law claim and pendent state law claims including one for common law fraud.[6] The conveyance pursuant to which Continental Bank assigned the nonrecourse loan to the FDIC stated that it and claims related to it should be construed in accordance with federal law and the

---

6 Even if it had not been dismissed, punitive damages would not have been available under the federal securities law claim. *See Avern Trust* v. *Clarke*, 415 F.2d 1238, 1242 (7th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970); 2 L. Schlueter & K. Redden, *Punitive Damages* § 19.2(F), at 330 (2d ed. 1989) ("All legislative provisions establishing rights of civil action for fraudulent behavior in securities transactions expressly limit recovery to the amount of actual damages."). Continental Bank therefore had no punitive damage claim to assign to the FDIC under federal law.

law of Illinois (if not inconsistent). Since the federal claim was dismissed after the substitution and prior to trial, the only claim that survived was one for common law fraud, as to which Illinois law governs.[7]

Under Illinois law, whether a claim is assignable depends upon whether it would survive the death of the injured party; claims that do not survive are *not* assignable. *North Chicago Street Ry.* v. *Ackley*, 171 Ill. 100, 108-09, 49 N.E. 222, 225 (1897); *Christison* v. *Jones*, 83 Ill. App. 3d 334, 337, 405 N.E.2d 8, 10 (1980) (citing *Ackley*); 3 Ill. Law & Prac. *Assignments* § 12, at 435 (1953); *accord Creighton* v. *County of Pope*, 386 Ill. 468, 475, 54 N.E.2d 543, 547 (1944) ("assignability and survivability of causes of action, being tests each of the other, are convertible terms"). Accordingly, since common law claims for punitive damages do *not* survive the death of the injured party in Illinois,[8] they are not assignable to the FDIC or anyone else.[9]

---

7 State law should govern not only because of the language of the assignment here, but also because, as held by the Seventh Circuit (in a case in which the FDIC commenced suit in its capacity as assignee of an insured bank's assets):

> "[t]he absence of any ready-made federal common law in most of the areas of law in which it might be applied, and a general reluctance to displace state law without explicit statutory or constitutional direction to do so, support a *presumption* that state law is adequate and should be adopted by the federal court as the rule of decision." *FDIC* v. *Braemoor Associates*, 686 F.2d 550, 554 (7th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (emphasis added).

Thus, before "federal law" on the assignability of punitive damages could arguably apply here, the FDIC would first have the burden of rebutting the presumption in favor of state law.

8 *In re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594, 605-06 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981), *citing Mattyasovszky* v. *West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975); *see also Froud* v. *Celotex Corp.*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983) (unanimously reaffirming *Mattyasovszky*).

(*Footnote 9 appears on following page*)

Moreover, even if the FDIC did acquire the punitive damage claim, that only opens the inquiry as to whether, consistent with the Fifth, Eighth and Fourteenth Amendments, a federal agency may be awarded punitive damages by a jury given "standardless discretion" to punish the defendant. The Response simply fails to address that issue.

IV. In the Exercise of Its Supervisory Authority, and to Prevent the Waste of Judicial Resources, This Court Should Consider and Clarify the Proper Procedure After a Trial in Which the Plaintiff Fails to Prove Damages.

The Response is flatly incorrect both factually and legally in arguing that the FDIC did in fact establish damages at the first trial and is therefore entitled to a second trial to establish them (SG Br. at 7; *compare* Petition at 11.)[10] As the court of appeals found, the FDIC put on *no* evidence of damages and had no excuse for its default (Petition App. at

---

9 The FDIC flatly misstates the law when it avers that lower courts have "widely recognized" the assignability to the FDIC of fraud claims seeking punitive damages (SG Br. at 5 n.1). None of the holdings in any of the four cases cited by the FDIC, *FDIC* v. *Hudson*, 643 F. Supp. 496, 498 (D. Kan. 1986); *FDIC* v. *Main Hurdman*, 655 F. Supp. 259, 268 (E.D. Cal. 1987); *Brown* v. *New York Life Insurance Co.*, 152 F.2d 246 (9th Cir. 1945); *FDIC* v. *Abraham*, 439 F. Supp. 1150, 1152 (E.D. La. 1977), addresses punitive damages. They simply assert that tort claims are assignable to the FDIC, but that proposition is not now at issue.

10 The Response characterizes *Blake* v. *Robertson*, 94 U.S. 728 (1876) as standing for the proposition that "[n]ominal damages are appropriate where *damages* are 'meager and indefinite' " (SG Br. at 8, emphasis supplied); instead, the case states that nominal damages should be awarded where "[t]he *proof* is meagre and indefinite," (94 U.S. at 733; emphasis supplied), a much different proposition. Similarly, in attempting to distinguish *Ustrak* v. *Fairman*, 781 F.2d 573 (7th Cir.), *cert. denied*, 479 U.S. 824 (1986), the FDIC argues that nominal damages are appropriate "where compensation is sought for a 'trivial deprivation of amenities' " (SG Br. at 8). The quoted language is from the section of the court of appeal's decision discussing its remittitur of the punitive damage award. 781 F.2d at 579. The court *held* that nominal damages must be entered where, as here and in *Ustrak*, "there is a complete failure of proof." *Id.* at 578.

14A). This is not a case, as the Response contends, where an incorrect theory of damages was applied (SG Br. at 7). Rather, the FDIC affirmatively chose to rely on rescission only, and forego compensatory damages (Petition at 3, 11). Conservation of scarce judicial resources as well as long-established precedent requires that only nominal damages may be recovered in such circumstances.

CONCLUSION

For the foregoing reasons, and the reasons expressed in Grace's Petition For a Writ of Certiorari and the Supplemental Brief of Petitioners, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Dated: New York, New York
March 9, 1990

W. Donald McSweeney
Allan Horwich
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Denis McInerney*
Charles A. Gilman
CAHILL GORDON & REINDEL
Eighty Pine Street
New York, New York 10005
(212) 701-3000
*Counsel of Record for Petitioners